

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	CASE NO.: 1:15-CV-01046
)	
Plaintiff,)	
)	JUDGE SOLOMON OLIVER, JR.
vs.)	
)	<u>MOTION TO APPROVE SEARCH AND</u>
CITY OF CLEVELAND)	<u>SEIZURE POLICIES</u>
)	
Defendant.)	
)	
)	

Pursuant to Paragraphs 160 through 172 of the Consent Decree and the Fourth-Year Monitoring Plan in the above-captioned matter, the City of Cleveland (the “City”), on behalf of the Cleveland Division of Police (“CDP” or “Division”), submitted five policies (collectively, the “Search and Seizure Policies”) relating to stops, searches, and arrests: (1) Search and Seizure; (2) Investigatory Stops; (3) Probable Cause/Warrantless Arrests; (4) Strip Searches & Body Cavity Searches; and (5) Miranda Warning and Waiver, attached hereto as Exhibits A through E, respectively.

The Monitoring Team has carefully reviewed the Division’s proposed Search and Seizure policies. Altogether, they conform to the terms of the Consent Decree, to federal and state law, and to the safeguards of the U.S. Constitution. They provide appropriate guidance to Division

members on the expectations that accompany all officer-citizen encounters. The Monitoring Team therefore recommends that the Court approve CDP's proposed Search and Seizure Policies.

I. SUMMARY OF CONSENT DECREE REQUIREMENTS REGARDING SEARCH AND SEIZURE POLICIES

The Consent Decree contains substantial requirements relating to the Division of Police's search and seizure practices. Under the Decree, "CDP will revise, develop, and implement search and seizure policies that comply with applicable law, and include the requirements below[:]

- Officers will not use an individual's gender, race, ethnicity, national origin, or perceived sexual orientation as a factor, to any extent or degree, in establishing reasonable suspicion or probable cause, unless such information is part of an actual and credible description of a specific suspect in an investigation that includes other identifying factors.
- Officers will not conduct investigatory stops when they lack reasonable suspicion.
- Officers will not conduct pat down searches without specific and articulable facts to reasonably suspect that a particular person is armed and dangerous. This does not restrict an officer's ability to conduct a search incident to arrest or prior to transport.
- Where an officer seeks consent for a search, the officer will inform the person of his or her right to refuse and to revoke consent at any time and document the person's consent.
- CDP officers will not rely solely upon an individual's geographic location, or presence in a high crime area without any other specific and articulable facts indicating that the individual has been, is, or is about to engage in criminal activity, as the basis for an investigatory stop.
- Officers will immediately notify a supervisor when effectuating a custodial arrest for obstructing official business, resisting arrest, or assaulting an officer and no other substantive violation is alleged. Upon notification, the supervisor will respond to the scene.
- Officers will not use 'canned' or conclusory language without supporting detail in documents or reports documenting investigatory stops, searches, or arrests.

- Officers will articulate the justification for an investigatory stop, search, or arrest in a specific and clear manner in their reports.
- CDP supervisors will review each arrest report by officers under their command, whether or not they involve the seizure of contraband, and will sign off on those reports to memorialize their review within 24 hours of the arrest, absent exceptional circumstances.”
- CDP supervisors will take appropriate action to address all apparent violations or deficiencies in investigatory stops, searches, and arrests.”
- A command-level official will review, within seven days of their completion, all supervisory reports of investigatory stops and pat-down searches not supported by reasonable suspicion, all searches and arrests not supported by probable cause, and all investigatory stops, searches, and arrests that were in violation of CDP policy, or that indicated a need for corrective action or review of agency policy, strategy, tactics, or training. The commander will evaluate the supervisor’s assessment and recommendations and ensure that all appropriate corrective action is taken, including referring the incident to Internal Affairs for investigation, if warranted.”

Dkt. 7-1 at ¶¶ 160-72.

II. PROCEDURAL HISTORY

In the fall of 2017, the Parties and Monitoring Team began drafting five related policies: Search and Seizure, Investigative Stops, Probable Cause/Warrantless Arrests, Strip Searches & Body Cavity Searches, and Miranda Warning and Waiver. The Parties and Monitoring Team worked to ensure that the policies aligned with legal requirements as well as the specific mandates of the Consent Decree.¹

Consistent with the Decree, there have been substantial opportunities for the residents of Cleveland to offer input on the Search and Seizure Policies. In March 2018, as the initial drafts of the policies were being developed, the Community Police Commission (“CPC” or “Commission”),

¹ In drafting the policies, CDP elected to address a number of important issues relating to stops, searches, and arrests, such as certain procedures around vehicle stops, consent searches, and juvenile interactions, through officer in-service training rather than directly in the policies. CDP is currently working to design Search and Seizure training that will address such procedures that otherwise are not covered in detail in the submitted policies.

led by its Search and Seizure workgroup, put together a comprehensive presentation to educate community members on the legal parameters of police encounters, the Fourth Amendment, voluntary contacts, detention, arrests, and warrantless searches.

On August 15, 2018, the Parties and Monitoring Team completed initial drafts of the Search and Seizure Policies and shared the drafts publicly to solicit input from the Cleveland community. The CPC's Search and Seizure workgroup gathered public feedback on the draft policies and shared its final report of policy recommendations to the City on November 14, with support from groups such as the ACLU of Ohio, the Cleveland Branch of the NAACP, and the Legal Aid Society of Cleveland. At the same time, the City gathered community feedback separate from the Commission, utilizing the Division's District Policing Committees.

Throughout the remainder of 2018 and early 2019, the Parties and Monitoring Team continued to work on the Search and Seizure Policies, considering and incorporating the CPC's recommendations, as appropriate. On April 28, 2019, the Division submitted proposed final drafts of the five Search and Seizure Policies.

III. STANDARD OF REVIEW

The Monitoring Team's role is to "assess and report whether the requirements" of the Consent Decree "have been implemented." Dkt. 7-1 at ¶ 351; *accord id.* ¶ at 352 (requiring the Monitor to "review . . . policies, procedures, practices, training curricula, and programs developed and implemented under" the Decree). The task of the Monitoring Team here is to determine whether the five submitted policies comply with the Consent Decree's requirements.

IV. ANALYSIS OF THE SEARCH AND SEIZURE POLICIES

A. Search and Seizure

The Search and Seizure Policy constitutes CDP's general practice, consistent with the law, that searches "generally must be made pursuant to a warrant[;]" without a warrant, there must be specific circumstances that, under state and federal law, permit a warrantless search. Ex. A at 2; *see, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967). Consistent with law, the policy identifies those exceptions:

1. Open View and Plain View Searches
2. Consent Searches
3. Exigent Circumstances
4. Pat Down/Frisks During Investigatory Stops
5. Custodial Searches and Other Searches Incident to Arrest
6. Vehicle Inventory Searches
7. Open Fields

Ex. A at 2-3. These exceptions to the warrant requirement are established via case law, and they are appropriately described at length in the Division's Search and Seizure Policy. *See id.* at 3-9.

Under the policy, officers shall "[t]reat searched and/or seized persons with courtesy, professionalism, respect, dignity, and equality." *Id.* at 3. Officers also must "[u]se accurate and specific descriptive language to articulate the justification for any search or seizure in their reports. Articulation of reasonable suspicion and/or probable cause shall be specific, clear, and based on information not influenced by bias or prejudice." *Id.* CDP officers cannot "[u]se or rely on information the officer knows or reasonably suspects to be materially false, incorrect, or unreliable in establishing reasonable suspicion[.]" *Id.*

The Search and Seizure Policy further outlines the expectation that officers may not, when articulating the justification for a search or seizure, "use 'canned' or conclusory language without

supporting detail[.]” *Id.* at 9. Supervisors must review all documentation of stops, searches, and arrests, assessing the basis for reasonable suspicion or probable cause and the use of “canned” or conclusory language. *Id.* Where supervisors identify searches and seizures that are unsupported by reasonable suspicion or probable cause; in violation of Division policy; or that “indicate a need for corrective action or review of agency policy, strategy, tactics, or training[.]” they will document and report their findings through the CDP chain of command. *Id.*

B. Investigatory Stops

There is a dedicated policy for Investigatory Stops, otherwise known as “Terry” stops, so named after *Terry v. Ohio*, 392 U.S. 1 (1968)—precedent established by the United States Supreme Court pursuant to a case that occurred in downtown Cleveland in 1963. The Investigatory Stops Policy appropriately notes the various levels of police-citizen encounters, from voluntary contacts to investigatory stops to arrests. Importantly, “officers must distinguish between voluntary contacts and Terry stops.” Ex. B. at 2.

The Investigatory Stops Policy outlines the specific conditions that may form the basis for an investigatory stop: “[a]n officer(s) may conduct an investigative stop of an individual after identifying themselves as a Cleveland Police Officer(s), if they have reasonable suspicion that the individual has committed, is committing, or is about to commit an offense.” *Id.* at 3. The policy specifically articulates that the open-carry of firearms, standing alone, does not justify an investigatory stop-and-frisk. Further, “[e]very officer conducting a stop must be prepared to articulate specific facts and circumstances in support of the officer’s determination that reasonable suspicion or probable cause was present and identified.” *Id.* In establishing reasonable suspicion or probable cause, CDP officers “may take into account the race, ethnicity, gender, or other demographic characteristics of an individual . . . only when the characteristics are part of an actual

and credible description of a specific suspect in an investigation that includes other identifying factors.” *Id.* at 3. Further, officers “shall not rely solely upon an individual’s geographic location, or presence in a high crime area without any other specific and articulable facts indicating that the individual has been, is, or is about to engage in criminal activity, as the basis for an investigatory stop.” *Id.* at 4 (emphasis in original).

The policy further lists the factors that may inform reasonable suspicion under the totality of the circumstances. Relying on activity they personally perceive or through information obtained from credible persons, officers may consider such factors as the person’s appearance or actions, the officer’s prior knowledge of the person, the area of the stop, the time of day, and the source of the information. *Id.* at 4-5. But CDP officers “shall not rely solely upon any single factor . . . without other specific and articulable facts indicating that the individual has been, is, or is about to engage in criminal activity[.]” *Id.* at 4.

Under the Division’s Investigatory Stops Policy, “[o]fficers shall limit the investigatory stop to a reasonable scope.” *Id.* at 5. Officers must articulate additional justification for further limiting a person’s freedom during an investigatory stop. Actions that would further limit a person’s freedom include taking a person’s identification away from him or her; ordering a motorist to exit a vehicle; placing a pedestrian up against a wall; directing a person to lie or sit on the ground; applying handcuffs; pointing a firearm; and frisking the individual for weapons. *Id.* The investigatory stop also must be limited to a “reasonable amount of time,” or “that period of time necessary to affect the purpose of the stop.” *Id.*

Officers conducting investigatory stops must document the stop prior to the end of the officer’s assignment or tour of duty. At a minimum, the information provided must include such variables as the location of the stop; the subject’s race, ethnicity, age, and gender; the presence and

number of any passengers; the reasonable articulable suspicion that justifies the stop; whether any individual was asked to consent to a search and whether such consent was given; whether a pat down, frisk, or other non-consensual search was performed; a full description of any contraband or evidence seized; and the disposition of the stop, including whether a citation or summons was issued or an arrest made of any individual. *Id.* at 8. CDP policy aims to ensure that the officer documenting the encounter can point to specific “facts available to the officer at the moment of the seizure” that would “warrant a man of reasonable caution in the belief” that “criminal activity may be afoot.” *Terry*, 392 U.S. at 21–22, 30. Insufficiently specific justifications for a stop, frisk, or search violate policy and do not satisfy the requirements of *Terry* and its progeny.

C. Probable Cause/Warrantless Arrests

As the standard for warrantless arrests, probable cause is a foundational legal doctrine put into daily practice by law enforcement officers. Appropriately, CDP’s Probable Cause/Warrantless Arrests Policy outlines the contours of probable cause and the circumstances under which officers may arrest an individual in the absence of a judicial warrant. Under the policy, officers may not make a warrantless arrest unless the officer has probable cause (1) that a subject has committed or is committing a felony offense; (2) that a subject has committed or is committing certain misdemeanor offenses, such as an offense of violence, criminal child enticement, aggravated trespass, theft, and others; or (3) that a subject, from the officer’s own observations, has committed or is committing any other misdemeanor offense. Ex. C. at 1-2.

In addition to notifying supervisors and submitting an arrest report upon all warrantless arrests, officers must properly complete the appropriate Probable Cause Affidavit, which will make its way through the Division’s chain of command. In the case of an arrest for a felony and certain misdemeanors, detectives will ensure that the arrested persons are charged or released as

applicable. *Id.* at 4. Supervisors must review arrest reports and probable cause affidavits, reviewing them for deficiencies such as “canned or conclusory language without supporting detail, inconsistent information, insufficient articulation of the basis for the action, or other information in the reports or forms that is not correct or complete” and arrests “following stops that were not supported by reasonable suspicion” and “that are not supported by probable cause.” *Id.* at 5.

D. Strip Searches & Body Cavity Searches

Under the CDP’s submitted policy, “[a] strip search or body cavity search may be conducted if there is probable cause to believe that the person is concealing evidence of the commission of a criminal offense[.]” Ex. D. at 1. The search “must be supported by articulable facts considering the nature of the offense, circumstances of the arrest, and if known, prior criminal/conviction record of the person or that the arrestee may possess weapons or contraband on or in their body.” *Id.* The officer or sergeant shall explain the reason for the search and give the individual an opportunity to voluntarily produce the suspected item. *Id.* at 1-2.

Body cavity searches shall be conducted only after a warrant has been issued that authorizes the search (absent a medical emergency justifying a warrantless search) and warrant requests must be pre-approved in writing by a CDP supervisor. Body cavity searches shall be conducted only by a licensed physician, registered nurse, or practical nurse. “Officers shall make a reasonable effort to notify a parent/guardian if a body cavity search is conducted on a juvenile.” *Id.* at 2.

The policy also states that strip searches shall only be conducted in a secure holding facility, unless there are “exigent circumstances when an officer(s) have probable cause to believe that the subject is hiding a firearm or dangerous ordnance, when less intrusive means of discovering a weapon or contraband are not available.” *Id.* Strip searches “shall be conducted in a professional

manner by the officer and a witness to the search who are the same gender as the arrestee. . . . If an officer is uncertain regarding an arrestee's gender/gender identity, officers shall respectfully request the arrestee's gender/gender identity." *Id.* at 2-3.

Supervisors "shall review all information pertaining to any request by a police officer to conduct a strip or body cavity search." *Id.* at 3.

E. Miranda Warning and Waiver

The last of the five Search and Seizure policies addresses the questioning of criminal subjects with respect to Miranda warnings. Previously, the Division of Police did not have a separate policy addressing the requirements that officers advise an individual taken into custody of his or her Fifth Amendment and related rights.

The Division's new Miranda Warning and Waiver Policy states that CDP officers shall provide the Miranda warning when "[a] subject is in custody AND [t]he officer is to question or interrogate the individual about any crime." Ex. E. at 1 (emphasis in original). Where there is "any doubt whether custody and/or interrogation is/are present, officers shall resolve the doubt in favor of giving the Miranda Warning." *Id.* at 2. The Miranda warning and any waiver shall be recorded on officers' body cameras and noted in their incident report. *Id.* Officers are required to ask the subject to verbally affirm that he or she understands the Miranda warning, rather than by a physical gesture. *Id.*

When questioning a criminal subject who is deaf, hard of hearing, or has limited English proficiency, the Miranda warning "shall be administered via a qualified interpreter[.]" *Id.* For individuals with limited English proficiency, officers shall use a "Your Rights" form that has been translated into the subject's primary language, where possible. *Id.*

When questioning a criminal subject who is a juvenile, “officers shall consider the juvenile’s age when determining whether the juvenile would not feel free to leave. A child may be in custody [a reasonable person in the individual’s position would not feel free to leave based on a totality of the circumstances] for purposes of the Miranda rule when an adult in the same circumstances would not.” *Id.* To that effect, “[o]fficers shall explain the Miranda Warning in an age-appropriate manner, and each warning shall be read slowly and one at a time.” *Id.* at 3.

After a CDP officer has informed a subject of his or her Miranda rights, the individual may waive those rights, provided that the waiver is “knowing and voluntary . . . and any waiver must not be due to coercion.” *Id.*

Additionally, the Miranda Warning & Waiver Policy addresses the subject’s invocation of his or her Miranda rights, re-questioning a subject after he or she has invoked Miranda, officers’ potential duty to reread the Miranda warning after breaks in interrogation, and an exception to the Miranda warning when “there is an objectively reasonable need to protect the police or public from an immediate danger associated with a weapon or other harmful objects.” *Id.* at 4-5.

V. CONCLUSION

The task of the Monitoring Team is to duly consider whether the City’s proposed Search and Seizure policies satisfy the terms of the Consent Decree. The Monitoring Team concludes that the policies meet the terms of the Consent Decree. An important initial milestone in the Consent Decree’s implementation with respect to Search and Seizure, the submitted policies provide appropriate written guidance for officers engaging in police-citizen encounters. Accordingly, the Monitoring Team approves the Search and Seizure Policies in their entirety and requests that this Court order them effective immediately so that the Division can provide comprehensive training on the policies and implement them actively in the field.

Respectfully submitted,

/s/ Matthew Barge

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2019, I served the foregoing document entitled Motion to Approve Search and Seizure Policies via the court's ECF system to all counsel of record.

/s/ Matthew Barge
MATTHEW BARGE